UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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CHEF'S WAREHOUSE, INC.,

Plaintiff,

v. 20 CV 04825 (KPF)
Telephone Decision

LIBERTY MUTUAL INSURANCE CO., ET AL.,

Defendants.

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New York, N.Y.
April 21, 2022
12:06 p.m.

Before:

HON. KATHERINE POLK FAILLA,

District Judge

APPEARANCES VIA TELECONFERENCE

REED SMITH, LLP
Attorneys for Plaintiff
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BY: RACHEL ROSE HAGER

(Case called)

MR. ELLISON: Good afternoon, your Honor. It's John Ellison and Matt Rosso for Chef's Warehouse.

THE COURT: Good afternoon, and thank you very much for participating.

And representing the defendant?

MS. HAGER: Good afternoon, your Honor. Rachel Hager for the defendants from the law firm of Finazzo, Cossolini, O'Leary, Meola & Hager.

THE COURT: Thank you so much.

All right. Good afternoon to each of you, and I appreciate your willingness to participate by telephone. I have an oral decision in this matter, and I wanted to get it to you as quickly as I could. What I would ask, and what I'll give you a moment to do, is that you please mute your line because I'm going to be reading this decision into the record. It is a little bit lengthy, and I am going to ask Ms. Hager to obtain a copy of the transcript of the decision in the ordinary course, and if that is done, then I will receive it automatically. So I'll give you a moment to mute, and then I will begin. Thank you.

(Pause)

I will begin.

As the parties know, the motion now before the Court is defendant Employer's Insurance Company of Wausau's second

dispositive motion at the pleading stage of this case. Plaintiff, the Chef's Warehouse, Incorporated, a purveyor of specialty foods to various culinary markets, brings claims for breach of contract and declaratory judgment alleging that defendant breached its insurance coverage obligations under a first-party property policy -- which I'll call "the policy" -- when it denied plaintiff's claim for losses related to business interruptions caused by the Covid-19 pandemic. Defendant has moved, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss.

In the first round of motion practice, the Court granted defendant's motion for judgment on the pleadings, reasoning that plaintiff claimed harm relating to the loss of use of its and its customers' property occasioned by the pandemic, did not constitute "direct physical loss or damage" necessary to trigger coverage under the policy.

Plaintiff has since filed the amended complaint, which supplements its allegations to include the actual presence of SARS-CoV-2 virions on property covered by the policy.

On this motion, plaintiff's theory of physical loss or damage centers on the claim that the presence of SARS-CoV-2 virions transformed the air and surfaces inside property, rendering plaintiff's property, and that of its customers, a dangerous infection hazard. Plaintiff further contends that eradicating the virus entails more than routine cleaning or

disinfecting, thus, making the virus analogous to asbestos and resilient substances, whose presence courts have determined can cause direct physical damage.

This Court remains reluctant to agree with certain of its colleagues, who have resorted to extra-record evidence to conclude that the Covid-19 virus did not meaningfully resist common methods of cleaning and, thus, cannot cause direct physical damage. To this Court, that appears to be an empirical question that cannot be resolved without further factual development.

However, as explained in a few moments, this Court concludes that plaintiff has continued to plead conclusory allegations in support of its claims that physical damage caused by the presence of the virus.

Plaintiff asks this Court to trust that discovery will reveal the true extent of property damage caused by Covid-19, but its promises of future information are insufficient to buttress otherwise inadequate allegations. At the same time, the Court acknowledges the emergence of certain Second Circuit decisions that touch on the risk to property posed by the Covid-19 virus. The tenor of this still-developing precedent would seem to cut against plaintiff's claim for coverage in coverage in this case, and perhaps even of this Court's view of the issue.

Bracketing these difficult questions of coverage under

the policy, it is clear that plaintiff's claim falls squarely within the policy's contamination exclusion. As such, even were the Court to find that plaintiff had adequately pleaded coverage, it would find plaintiff's claim for coverage to be barred by the express terms of the policy.

The Court will, therefore, grant defendant's second motion, dispositive motion, which is a motion to dismiss the amended complaint.

Turning now to some background facts and procedural history. The factual background of this case is outlined in some detail in the Court's prior opinion on defendant's motion for judgment on the pleadings, and the Court presumes familiarity with the facts of this case. Accordingly, the Court will recite only those facts necessary to resolve the instant motion.

Plaintiff purchased an all-risk insurance policy with defendant that provided business interruption coverage for a term running from August 1st, 2019, through August 1st of 2020. The policy extended coverage to plaintiff's actual losses sustained and extra expenses incurred from a business interruption caused by "direct physical loss or damage" to the covered property.

The policy contained several time-element provisions detailing the types of business interruptions covered by the policy. As relevant to this case, the policy's contingent

time-element provision provides coverage for business interruption stemming from physical loss or damage suffered by plaintiff or one of plaintiff's direct or indirect customers.

In addition, the policy's civil or military authority provision extends coverage to business interruptions sustained "if an order of civil or military authority prohibits access to a covered location provided such order is caused by physical loss or damage of the type insured by this policy at a covered location" or within the number of statutory miles from a covered location as specified by the policy.

The policy also contains several coverage exclusions, including the contamination exclusion. Under the contamination exclusion, the policy does not cover "contamination and any costs due to contamination, including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy except as provided elsewhere in this policy."

The policy then defines "contamination" as any condition of property that results from a contaminant. With "contaminant" defined to include a virus or any disease-causing or illness-causing agent.

On April 29th, 2020, plaintiff provided a notice to defendant of a claim for time-element losses, including under the civil authority and contingent time-element provision. In connection with the pandemic-induced business interruption

faced by plaintiff and its customers, defendant denied this claim on May 4th of 2020, explaining that the time-element coverages available under your policy requires physical damage by a peril insured against. Defendant concluded that as there was no physical damage, and contamination is an excluded peril, there is no coverage provided for plaintiff's business interruption loss.

On the basis of this denial, on June 23rd of 2020, plaintiff filed the underlying complaint initiating this lawsuit. Defendant filed a motion for judgment on the pleadings on February 8th of 2021, which the Court granted in an opinion and order dated September 15th of 2021.

In granting defendant's motion for judgment on the pleadings, the Court determined that plaintiff had not adequately alleged that it, or its customers, had suffered direct physical loss or damage, a threshold requirement for coverage under any provision of the policy. Indeed, the underlying complaint assiduously avoided alleging the actual presence of Covid-19 on any covered property. Instead, plaintiff grounded its coverage claim on the threatened presence of COVID-19 and the various governmental shutdown orders that rendered its property and the property of its customers unusable for their intended purposes.

The Court held that this was insufficient to satisfy the requirement of direct physical loss or damage to trigger

coverage because the uninterrupted lines of cases applying New York law make clear that the contractual phrase "direct physical loss or damage" was unambiguous in demanding actual, demonstrable physical harm of some form and did not extend to the mere loss of a property's intended use due to the Covid-19 pandemic or related governmental restrictions.

Additionally, the Court dismissed plaintiff's claim to coverage under the policy's civil and military authority provision because, No. 1, plaintiff failed to allege a qualifying physical loss or damage to implicate the type of civil authority order giving rise to coverage. No. 2, the civil authority orders dealing with the pandemic did not impose a complete denial of access, as required to invoke coverage. And No. 3, plaintiff had not substantiated its argument that any governmental shutdown order was enacted in response to the physical damage or loss caused by the pandemic.

The Court's earlier opinion also addressed the possibility that plaintiff might be able to plead the occurrence of direct physical loss or damage resulting from the actual presence of the virus on any covered property. The Court diverged from several District Courts in this circuit, which had held that even allegations positing the actual presence of the virus failed to constitute physical loss or damage because the virus could be easily cleaned and removed from surfaces.

This Court expressed concern that relying on the efficacy, or lack thereof, of cleaning and disinfecting measures might exceed the bounds of what it may properly consider on a rule 12(c) motion.

The Court granted plaintiff leave to replead allegations bearing on the actual presence of Covid-19 on covered property, but in so doing expressed scepticism, and I quote, "that plaintiff will be able to thread the needle on alleging facts that implicate coverage under the policy without simultaneously implicating the contamination exclusion."

Plaintiff filed the amended complaint on October 7th of 2021, and among the additions to this amended pleading is new information concerning the transmission of Covid-19 and the modes of damaging property. On this front, plaintiff alleges that Covid-19 can be transmitted by aerosol, fecal bio-aerosols and fomites from which it follows the SARS-CoV-2 causes property damage, and I quote, "by rendering property unsafe and unfit for habitation case and use by transforming both the shared air breathed by the property's occupants and the physical surfaces of the property itself."

Plaintiff also alleges facts going to the resiliency of Covid-19, contending that it can remain on surfaces and suspended in the air for an extended period and that addressing the coronavirus is not nearly a matter of cleaning. And I've been quoting from the amended complaint in this section, as I

will continue to do for the next paragraph or so.

Also new to plaintiff's pleadings is the allegation that SARS-CoV-2 virions were present in Chef's Warehouse's locations, as well as those of its customers, including cruise lines, hospitals, healthcare facilities, theme parks, hotels and restaurants. According to plaintiff, the presence of SARS-CoV-2 "compromised the physical integrity of these properties, tangibly altered the property and air therein and rendered the properties unusable and functionally uninhabitable for their intended purpose."

Plaintiff further alleges that the government's failure to control the pandemic exacerbated the spread of Covid-19, as well as the resulting physical damage or loss.

On January 11th of 2022, defendant moved to dismiss the amended complaint. Plaintiff filed opposition papers on March 3rd of 2022, and defendant filed its reply brief on March 24th of 2022. On April 8th of 2022, defendant filed a notice of supplemental authority advising the Court of recent decisions in this district issued by Judge Gardephe, Judge Abrams and Judge Vyskocil and in the Appellate Division of the First Judicial Department of New York State Supreme Court authored by Judge Gische.

So turning now to the applicable standards, and I know the parties are aware of these; so I'll just summarize them briefly. A Court considering a motion to dismiss for failure

to state a claim under Federal Rule of Civil Procedure 12(b)(6), should draw all reasonable inferences in plaintiff's favor, assume all well-pleaded factual allegations to be true, and determine whether they plausibly give rise to an entitlement to relief.

I'm quoting here from *Faber v. Metropolitan Life Insurance Company*, 648 F.3d 98 (2d Cir. 2011). To survive a motion to dismiss, a complaint must contain sufficient factual matter accepted as true to state a claim to relief that is plausible on its face. And I quote here from *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and that case, in turn, was quoting *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, (2007).

The plausibility requirement is not akin to a probability requirement, but it asks for more than a sheer possibility that the defendant has acted unlawfully. I quote then again from the *Ashcroft* decision.

Let me also note that in evaluating a motion to dismiss, the court may consider only a narrow universe of materials, including the complaint itself, documents appended to the complaint or incorporated by reference, matters of which judicial notice may be taken and documents that are properly deemed integral to the complaint. The standards for what may be included are set forth in Second Circuit cases such as *Goel v. Bunge, Limited*, 820 F.3d 554, (2d Cir. 2016).

So I turn now to the gating issue of interpreting insurance contracts under New York law. The policy does not contain a choice-of-law provision but the parties apply New York law in their briefing, and this implied consent is sufficient to establish choice of law, and I will use New York law to assess plaintiff's breach of contract claim.

Under New York law, an insurance contract is interpreted to give effect to the intent of the parties, as expressed in the clear language of the contract. I am quoting here from *10012 Holdings, Incorporated v. Sentinel Insurance Company Limited*, 21 F.4th 216, a Second Circuit decision from last year.

The initial interpretation of the contract is a matter for the Court to decide, and I quote there from *Morgan Stanley Group Incorporated v. New England Insurance Company*, 225 F.3d 270, (2d. Cir. 2000). If the language of an insurance policy is doubtful or uncertain in its meaning, any ambiguity must be resolved in favor of the insured and against the insurer. I quote here from *Westview Associates v. Guaranty National Insurance Company*, 95 N.Y.2d 334 (2000).

But where the provisions of the policy are clear and unambiguous, they must be given their plain and ordinary meaning and courts should refrain from rewriting the agreement. That's from *U.S. Fidelity & Guaranty Company v. Annunziata*, 67 N.Y.2d 229, a Court of Appeals decision from 1986.

As the party seeking coverage, plaintiff bears the burden of showing that the insurance contract covers the loss. The *Morgan Stanley Group* decision I mentioned earlier discusses this issue. If plaintiff satisfies this initial coverage burden, defendant, as an insurance carrier, then bears the burden of proof to demonstrate that an exclusion in the policy applies to an otherwise covered loss. I quote here from *Michael J. Redenburg, Esquire PC v. Midvale Indemnity Company*, 515 F. Supp. 3d 95 (S.D.N.Y. 2021).

An exclusion from coverage is read narrowly and will only save to bar coverage of an insured's claim where it is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case. And the *Westview Associates* case I spoke of a few moments ago is where that quote is from.

Turning now to the analysis of these claims. Plaintiff urges that the amended complaint's detailed allegations regarding the physical presence of SARS-CoV-2 on its and its customer's property suffices to plead direct physical loss or damage necessary to trigger defendant's obligation to ensure contingent business interruption and other losses under the policy. And relatedly, plaintiff argues that the defendant's proffers a tortured construction, and that's a quote, of the contamination exclusion, which does not bar coverage in this case.

As the Court will explain, binding precedent would appear to foreclose many of plaintiff's arguments in favor of coverage, but even assuming plaintiff has managed to allege direct physical or loss damages due to the actual presence of Covid-19, the contamination exclusion unambiguously applies to plaintiff's claim.

I turn first to the issue of policy coverage. Plaintiff argues that Chef's Warehouse and its customers suffered physical loss or damage to property due to: One, the actual presence of SARS-CoV-2 on their property; two, the continuing threat of SARS-CoV-2 on their property; three, the resulting stay-at-home orders; and, four, the government's failure to contain SARS-CoV-2. These interrelated causes of harm are all sourced from the Covid-19 virus, which plaintiff characterizes as a "Deadly, resilient physical substance that attaches to and alters indoor air and surfaces, thereby impairing the physical function of covered property for its intended use and purpose."

Plaintiff cites several scientific studies, as well as CDC guidance on viral surface transmission for the proposition that routine cleaning and disinfecting is insufficient to remove the presence of SARS-CoV-2 in a manner that would make the property safe for use. As a result, plaintiff and its customers have allegedly experienced ongoing physical loss or damage to property despite the remediation measures they have

implemented.

Plaintiff additionally argues that the average insured that purchases an all-risk policy covering losses resulting from physical loss or damage would reasonably construe that phrase to encompass a circumstance where the policyholder has lost the ability to physically use this property due to the actual presence of a dangerous physical substance in and on its property.

The Second Circuit has recently spoken to the reach of an insurance policy that covers losses stemming from direct physical loss or damage to property. In *10012 Holdings Incorporated v. Sentinel Insurance Company Limited*, the Second Circuit relied on *Roundabout Theater Company v. Continental Casualty Company*, 751 N.Y.S.2d 4 (1st Dep't 2002) and every other New York State court to have decided the issue -- and that is a quote -- in holding that, "under New York law, the terms 'direct physical loss' and 'physical damage' do not extend to mere loss of use of a premises where there has been no physical damage to such premises. Those terms instead require actual physical loss of or damage to the insured's property."

The Second Circuit has reaffirmed this holding in five subsequent decisions. They are, at least this is what the Court has found as of yesterday: *BR Restaurant Corporation v. Nationwide Mutual Insurance Company*, 2022 Westlaw 1052061, and

that was a summary order issued on April 8th of 2022; *SA Hospital Group LLC v. Hartford Fire Insurance Company*, 2022 Westlaw 815683; *Dear Mountain Inn, LLC v. Union Insurance Company*, 2022 Westlaw, 598976; *Kim-Chee, LLC v. Philadelphia Indemnity Insurance Company*, 2022 Westlaw 258569; and *Rye Ridge Corporation v. Cincinnati Insurance Company*, 2022 Westlaw 120782. These were all issued in the first four months of this calendar year.

Plaintiff seeks to distinguish this controlling precedent, and the many other concordant cases cited by defendants from this district and New York State courts, on the grounds that most of them did not deal with allegations that a policyholder's damage or loss was caused by the actual or even threatened presence of SARS-CoV-2 on insured property. In other words, plaintiff asserts that its allegations in this case amount to more than mere loss of use of property because it has alleged that the Covid-19 virus physically altered the indoor air and tangible surfaces it attached to within covered property.

Plaintiff further alleges that the virus causes property damage by rendering property unsafe and unfit for habitation and use by transforming both the shared air breathed by the property's occupants and the physical surfaces of the property itself, and that's paragraph 24 of the amended complaint. I'm also quoting in this section from pages 11 and

19 of the plaintiff's opposition.

This Court is skeptical that the amended complaint alleges as much as plaintiff claims in response to this motion. Plaintiff's theory of physical property damage rests on the cumulative infection hazard posed by respiratory aerosols, fecal bio-aerosols and the accumulation of SARS-CoV-2 virions on surfaces. Yet, it is unclear to the Court how the airborne presence of the Covid-19 virus damages property owned or controlled by plaintiff or its customers, besides posing a risk of settling on surfaces.

And separately, the Court sees reason to question plaintiff's allegations regarding the damage caused by the presence of the virus on surfaces. For one, plaintiff selectively quotes the CDC guidance upon which it relies for this proposition, noting that the CDC has said that there is little evidence to suggest that routine use of disinfectants can prevent the transmission of coronavirus in community settings, but neglecting to mention that the same CDC guidance goes on to explain that routine cleaning, performed effectively with soap or detergent at least once per day, can substantially reduce virus levels on surfaces.

In addition, plaintiff hints that more specificity about the identity of customers and the extent of property damage will be disclosed during discovery, when appropriate and protected under the parties' confidentiality agreement.

Plaintiff also represents that it has retained a virologist expert, who at the appropriate stage of this litigation, will substantiate and elaborate on SARS-CoV-2 and the physical damage it causes to property.

But these promises to provide more information at a later date do not convince this Court that the amended complaint clearly alleges that SARS-CoV-2 has caused the sort of physical damage to property necessary to trigger coverage under the policy.

To more succinctly articulate the Court's concern, plaintiff's allegations that the Covid-19 virus damages property by rendering it unsafe for occupation and use without extreme mitigation measures in place, sounds simply as an artful attempt to plead around the binding rule that the terms direct "physical loss" and "physical damage" do not extend to mere loss of use of the premises.

Most helpful to the Court on this front is plaintiff's allegation that SARS-CoV-2 variant compromised the physical integrity of Chef's Warehouse's property, and that is at paragraph 72 of the amended complaint. Although plaintiff does not provide any description as to how the virus might affect the physical integrity of any covered property, this is squarely the kind of allegation that makes out physical damage or loss, as courts have interpreted the phrase.

With that said, the Second Circuit in *Kim-Chee, LLC,*

v. Philadelphia Indemnity Insurance Company, seemingly rejected a version of the argument that the actual presence of the virus poses a risk of physical harm. In that case, the Second Circuit affirmed the district court's conclusion that the Covid-19 virus did not constitute physical loss of or damage to the subject property because it could not "physically alter or persistently contaminate property."

This Court acknowledges the Second Circuit's statement on this point, and that it very well may be dicta, but the Court is not convinced that it is equipped, on this record, to determine, as a matter of law, whether the coronavirus can cause physical damage to the property on which it attaches.

Defendant has cited several lower court decisions suggesting that the presence of the coronavirus at plaintiff's or its customer's properties cannot cause physical loss or damage because the virus' presence can be eliminated by routine cleaning and disinfecting. At this time, the Court is not willing to draw such a sweeping conclusion on what it perceives to be a contested fact.

In addition to its selective citation to CDC guidance, plaintiff also points to the existence of a scientific study suggesting that even extraordinary cleaning measures do not completely remove coronavirus from surfaces. If this allegation were to be borne out, if plaintiff could corroborate its claim that the presence of the coronavirus could compromise

a property's physical integrity, plaintiff very well may have stated a valid claim for coverage.

As this discussion should demonstrate, precedent from the Second Circuit very likely forecloses plaintiff's claim for coverage. This Court believes at this time there remains a narrow path for plaintiff to claim that the actual presence of the Covid-19 virus threatened the integrity of covered property, which would constitute physical loss or damage to trigger coverage under the policy.

However, this avenue for coverage does not save plaintiff's claims from dismissal, as the policy contains a contamination exclusion that directly bars coverage in this case and that the Court will turn to next.

Defendant argues that plaintiff's claimed losses are barred by the policy's contamination exclusion and plaintiff disagrees, contending that the exclusion is narrow in scope and does not apply to loss or damage due to actual contamination, or is at least ambiguous on this point.

As recounted earlier, the contamination exclusion applies to contamination and any costs due to contamination, including the inability to use or occupy property, or any cost of making property safe or suitable for use or occupancy. The policy defines contamination as any condition of property resulting from a contaminant. With "contaminant," in turn, defined to include virus or any disease-causing or

illness-causing agent.

In opposing defendant's motion, plaintiff seeks to draw a distinction between costs due to contamination, which are specifically referenced in the exclusion, and losses or damages, which are not. And this is set forth at pages 21 and 22 of plaintiff's opposition.

And on plaintiff's reading, if defendants intended the contamination exclusion to eliminate coverage for all loss or damage due to contamination, the provision would not have singled out cost while remaining silent as to other forms of recovery.

This Court finds this reading to be untenable. As noted, the policy broadly defines the term "contamination" to mean any condition of property that results from the contaminant, including a virus. The provision, thus, unambiguously bars coverage for any condition of property resulting from a virus and any cost due to such a condition.

Accepting plaintiff's interpretation of the provision would effectively erase the first two words "contamination and" from the exclusion, which is not an acceptable reading. As one of many cases at this point, I cite the parties to *Rutgerswerke AG & Frendo S.P.A. v. Abex Corp.*, 2002 WL 1203836 (S.D.N.Y. 2002), which notes that under New York law, a court must interpret a contract so as to give effect to all of its clauses and to avoid an interpretation that leaves part of

contract meaningless.

Even accepting plaintiff's point that there was a distinction between cost and loss or damage, the provision's plain terms do not limit the exclusions reached to claim seeking recovery of costs due to contamination.

Now, in arriving at this conclusion, this Court declines to follow the decision of a sister court in this district in *Four Equities, LLC, v. Factory Mutual Insurance Company*. That case is reported at 531 F. Supp. 3d 802, it was issued in 2021, and found an identical contamination exclusion to be ambiguous. The Court in *Four Equities* located ambiguity of the exclusion after crediting the policyholder's argument that because the insurance policy at issue in that case distinguished between "cost" and "loss" elsewhere, but did not do so in the contamination exclusion, it cannot be said that the exclusion unambiguously forecloses recovery on the policyholder's losses due to contamination. I am quoting from that decision at page 808.

But at the same time, the court acknowledged that the policyholder's reading of the exclusion as barring coverage only for costs of contamination risked rendering certain aspects of the exclusion meaningless, in particular, as this Court just noted, the first two words of the exclusion. Giving effect to these words, means that the exclusion could reasonably be read to encompass more than just any costs due to

contamination. That is from the sister court's analysis.

And so let me be clear. This Court agrees with the latter half of the *Four Equities* court's analysis, and it declines to manufacture ambiguity out of what is otherwise clear language. It is a basic principle of contract interpretation that parties cannot create ambiguity from whole cloth, where none exists, because provisions are not ambiguous merely because the parties interpret them differently.

As one of many cases for that principle, I commend to the parties the *Universal American Corporation v. National Union Fire Insurance Company of Pittsburgh*, 16 N.Y.S.3d 21 (2015).

This Court, thus, finds that the ordinary meaning of the contamination exclusion extends to plaintiff's claim in this case, as it seeks coverage for harm resulting from a condition of property resulting from a contaminant. Further, because the Court does not find the contamination exclusion to be ambiguous, it declines to consider the extraneous Insurance Services Office circular regarding virus exclusions to elucidate the meaning under the policy's contamination exclusion.

Plaintiff also seeks to evade the contamination exclusion by arguing that the exclusion does not cover concurrent causes of loss, which it claims is the case here because in addition to the actual presence of the coronavirus,

its losses were caused by the government's shutdown orders and the government's failure to contain the pandemic. This argument is contained at pages 24 and 25 of plaintiff's opposition.

And plaintiff argues that certain exclusions in the policy are prefaced with anti-concurrent cause language, specifying that losses brought about by two or more contributing causes are excluded from coverage. Because the contamination exclusion lacks a comparable preparatory clause, plaintiff argues that the provision does not exclude concurrent causes of loss, and, thus, the plaintiff's claim is not captured by the contamination exclusion.

This Court rejects plaintiff's attempt to disaggregate the Covid-19 virus from the governmental response to curb the same. Indeed, the emergency orders and the allegedly inadequate government response, are inherently and inextricably intertwined with the virus that plaintiff claims to have caused its losses. Plaintiff has not, in fact, alleged that its losses were caused by multiple discrete factors because the causes proffered by plaintiff all originate from the same source, the Covid-19 virus.

On this issue, the Court joins the body of precedent rejecting similar claims that the government's response to the Covid-19 pandemic is a distinct cause of harm, wholly separate from the pandemic itself. As several examples of cases in

which this analysis is undertaking, the Court cites *WM Bang LLC v. Travelers Casualty Insurance Company of America*, 2021 WL 4150844, a Southern District decision from September of 2021, collecting a number of cases; *Broadway 104, LLC v. XL Insurance America, Incorporated*, 2021 Westlaw 4150844, a Southern District decision from September of 2021, collecting a number of cases; *Broadway 104, LLC v. XL Insurance America, Incorporated,* 545 F. Supp. 3d 93, a Southern District decision from 2021; and *100 Orchard Street LCC v. Travelers Indemnity Insurance Company of America*, 542 F. Supp. 3d 227, a Southern District of New York decision from 2021.

In sum, this Court is doubtful that the amended complaint adequately pleads direct physical loss or damage necessary to trigger coverage under the policy. Even if it does, however, and to the extent that it does, the Court finds that plaintiff's claim clearly fits within the contamination exclusion and, as such, the defendant's motion to dismiss the amended complaint is granted.

Plaintiff has not requested leave to amend its pleadings for a second time. Even if it had, the Court does not view amendment to be appropriate, given the nature and history of this case. All that remains, and the Court will do this later today, is to issue an order directing the clerk's office to close this case.

With that, I do think thank the parties very much for

sitting patiently through a lengthy oral opinion. I appreciate the arguments in both rounds of motion practice in this case. I thank you very much. We are adjourned.

MS. HAGER: Thank you, your Honor.

MR. ELLISON: Thank you, your Honor.

(Adjourned)